THE GREAT EASTERN LIFE ASSURANCE CO. LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) June 20 & August 18, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 321 of 1983]

Revenue Law – Insurance company incorporated in Singapore – Taxation of funds invested in Malaysia – Malaysian Insurance Act 1963, s.10 – Income Tax Act 1967, ss. 3, 4 & 60.

Insurance – Life fund – Establishment of Malaysian Life Fund by Singapore insurance company – Income of fund and other non-assigned funds – Whether liable to tax – Insurance Act 1963 s.10 – Income Tax Act 1967, ss. 3, 4 & 60.

The appellant taxpayer is an insurance company resident in Singapore. It carries on insurance business in Malaysia through a permanent establishment and maintains a number of funds. By virtue of section 10 of the Malaysian Insurance Act, 1963, the taxpayer was required to establish a Malaysian Life Fund in support of its insurance business in Malaysia. The dispute in this case concerns the dividend income of the taxpayer for the years of assessment 1968 to 1974 consisting primarily of dividends and the rest of rents and the interest earned by the taxpayer from investments out of the Singapore Life Fund. The Special Commissioners held that such income was chargeable to tax under sections 3 and 4 of the Income Tax Act. The taxpayer's appeal to the High Court was unsuccessful. On appeal to the Federal Court,

Held, dismissing the appeal with costs: it seems absurd that while income derived from investments of Malaysian Life Fund in Malaysia is liable to tax, the income derived from investments in Malaysia of the Singapore Life Fund or other funds is not assessable to tax. Section 60(8) sweeps away that absurdity and provides a vehicle to catch such income by aptly categorizing it as "incidental gross income." The Federal Court saw no reason to disagree with the learned Judge in treating the income made up of dividends, interests and rents of the Singapore Life Fund and other funds as "incidental gross income" as long as the taxpayer is not taxed more than once on that income.

[*Editorial Note:* This case was under appeal to the Privy Council (No. 24 of 1985). The Judicial Committee in their judgment dated July 29, 1986 dismissed the appellant's appeal.]

Cases referred to:–

(1) *The Scottish Widows' Fund and Life Assurance Society* v. *Allan* 4 T.C. 369.
(2) *The Liverpool and London and Globe Insurance Company* v. *Bennett* 6 T.C. 327.
(3) *C.I.R.* v. *The Korean Syndicate Ltd.* 12 T.C. 181.
(4) *Hughes* v. *Bank of New Zealand* 21 T.C. 472.
(5) *Australasian Catholic Assurance Co. Ltd.* v. *F.C.T.* (1959) 100 C.L.R. 502.
(6) *Sugden* v. *Leeds Corporation* 6 T.C. 211, 253.
(7) *C.I.R.* v. *Sanderson* 8 T.C. 38.

FEDERAL COURT.

S. Woodhull for the appellant.

Mokhtar bin Hj. Sidin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is concerned with the interpretation of certain provisions, particularly section 60 of the Income Tax Act, 1967. The facts are not in dispute as they are agreed by the parties.

The Taxpayer is an insurance company resident in Singapore and also carries on insurance business in Malaysia through a permanent establishment. It maintains a number of funds. By virtue of section 10 of the Malaysian Insurance Act, 1963 the Taxpayer was required to establish a Malaysian Life Fund in support of its insurance business in Malaysia. It similarly maintains a Singapore Life Fund under the requirements of the Singapore Insurance Act, 1966. The income of the Malaysian Life Fund from investments carried out in and outside Malaysia has been assessed to tax under section 60(4) of the 1967 Act. No dispute arises in regard to the computation of this tax. The Taxpayer also made investments out of the Singapore Life Fund and also out of the other non-assigned funds. These investments earned dividends which are income for years of assessment 1968 to 1974. The Revenue decided that these dividend income were liable to tax under sections 3 and 4 of the 1967 Act. The tax assessed and in dispute is as follows:–

Year of Assessment	*Singapore Life Fund*	*Other Non-Assigned Fund*
1968	$1,636,333	$124,524
1969	639,087	57,519
1970	564,107	55,277
1971	915,684	55,081
1972	1,009,080	72,217
1973	277,866	90,498
1974	690,597	132,991

The question for the determination of the Special Commissioners is whether there is any liability to tax on the Malaysian income of the Singapore Life Fund and of the other non-assigned funds. By consent the parties agreed to take the year of assessment 1974 as the basis of a test case. The decision on that year of assessment would be binding for the other years of assessment. The

Special Commissioners held that such income was chargeable to tax under sections 3 and 4 of the 1967 Act.

We set out below the relevant provisions of the 1967 Act :–

"3. Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia."

"4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of –

(a) gains or profits from a business, for whatever period of time carried on;

(b) gains or profits from an employment;

(c) dividends, interest or discounts;

(d) rents, royalties or premiums;

(e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;

(f) gains or profits not falling under any of the foregoing paragraphs."

"52. In a case where any provision of this Chapter applies, the foregoing Chapters shall also apply but shall be modified in their application to the extent necessary to conform with that provision; and if in that case there is any inconsistency between that provision and any provision of the foregoing Chapters, that provision of those Chapters shall be void to the extent of the inconsistency."

"60(4) The adjusted income for the basis period for a year of assessment from the life business of an insurer not resident for the basis year for that year of assessment shall where that business is wholly or partly carried on in Malaysia consist of an amount arrived at by –

(a) taking the aggregate of –
  (i) the amount of the gross income for that period from the investments made (in Malaysia or elsewhere) out of the insurer's Malaysian life fund; and
  (ii) the amount of any gross proceeds (whether or not of an income nature) which are gross income to which subparagraph (i) applies and which are first receivable in that period in connection with the realisation of those investments or any rights arising from them; and

(b) deducting from that aggregate, where paragraph (a)(ii) is applicable for that period to gross proceeds receivable in connection with any investments or rights, the cost of acquiring and realising those investments or rights, and in any case –
  (i) management expenses incurred and commissions paid in that period in connection with the insurer's Malaysian life fund or in connection with that part of his life business which is carried on in Malaysia; and
  (ii) an amount bearing the same proportion to the head office expenses of the insurer incurred during that period in connection with his life business as the total of the gross premiums received by him during that period on account of Malaysian life policies in force at the end of that period bears to the total of the gross premiums received by him during that period on account of all life policies in force at the end of that period."

"(8) Where an insurer in connection with his life business or his general business receives any incidental gross income (not being a premium on a policy issued in the course of carrying on that life or general business) for which subsections (3) to (7) do not provide, that income shall be treated as income of the insurer falling under section 4(f) and he shall be deemed to have a separate source in respect of it."

At the hearing before the Special Commissioners the Taxpayer through its witness admitted that the investment of funds from Singapore and other places by the Taxpayer lost their identity as insurance funds but became ordinary business funds for investments in Malaysia. Undoubtedly, this influenced the decision of the Special Commissioners. The point before us, as before the Special Commissioners and the learned Judge, concerns mainly with the interpretation of section 60 of the 1967 Act. It is the contention of the Taxpayer that section 60(4) is a substantive section and is not a machinery section. It is a charging provision and is exhaustive. In other words, section 60(4) is fully exhaustive of the mode of computation of the chargeable income of a non-resident life insurance company and since section 60(4) is not applicable to the present income of the Taxpayer then accordingly no tax is payable in respect of the income arising from investments in Malaysia from the Singapore Life Fund and other non-assigned funds.

To show how the investment income could be regarded for tax purposes as part of the income of the insurance business the Taxpayer cited a few cases. In *The Scottish Widows' Fund and Life Assurance Society* v. *Allan*[1] the following passage from the judgment of Lord Trayner at page 380 was quoted:–

"... The business of Life Insurance is not purely philanthropic nor charitable, if not, I can see no other reason for its existence than the seeking of profit. It certainly results in profits being made – and that to a very large extent – for the profits made by the Widows' Fund (for example) from the investment of its capital alone amounts to considerably over half-a-million sterling per annum. It is said that that profit does not arise from life insurance, and that is true. But the profitable investment of the Society's funds so as

to yield profit to its members is an integral part of the Insurance Company's business ... "

Lord Shaw at page 377 in *The Liverpool and London And Globe Insurance Company* v. *Bennett*[2] made these observations:—

"Further, my Lords, not only was the entire business one business, but in the present instance it was so in a very special sense. Of these investments abroad there were three classes. 'A' was the class where the investments were actually required as a condition of the Company carrying on insurance business in the United States ..... The Commissioners state, and the fact must be so accepted, that these sums are available, like any other property owned by the Company, for any other purpose of the Company whenever the Company may think fit or necessary.' There can be no doubt whatsoever that these sums, one and all, whether invested in colonies or countries abroad by reason of an obligation to comply with local laws, or as a matter of business to add to the stability of the Company, its profit-earning or its attractiveness to foreign and colonial insurers, were in every sense of the term a business investment, that is to say, an investment in the course of business and for the purpose of business. No accountant, auditor or actuary could exclude the interest arising from such investments from the category of the earnings and profits of the Company."

In *C.I.R.* v. *The Korean Syndicate Ltd*[3] Rowlatt, J. remarked at page 196:—

"... in the case of an insurance company the holding of investments cannot be separated from the carrying on of the business of an insurance company, because it is an essential part of their business that investments should be held; but it was admitted, and I do not think the admission could have been withheld ... that if this had been the case of an individual he would not have been carrying on business, but would merely have been in the position of a depositor in a bank and a proprietor receiving rent or royalty on certain mineral rights ...".

The Revenue accepts the principle laid down by those authorities but submits that the appeal is not concerned with the nature of the business of the insurance company. It is concerned with the question whether the income of the Taxpayer from its investments comes within the special income as specified by section 60(4). Such income would be treated specially. However, section 60 does not provide that all income from the business of an insurance company must be treated under that section. In other words, section 60 applies to certain category of income but any income which does not come within that category would be treated as other income. This is where section 60(8) comes in. The learned Judge has dealt with this and we agree entirely with his interpretation.

The Taxpayer submits that there cannot be any room for doubt as to non-assessability in law of the income of the Singapore Life Fund. If, however, it is by any reasoning held to be open to doubt, the rule is that the construction most beneficial to the Taxpayer should be adopted. This point was fully examined right up to the House of Lords in *Hughes* v. *Bank of New Zealand.*[4]

It is submitted that nowhere in any Commonwealth tax jurisdiction has a similar income been brought to charge under items not expressly provided for. See *Australasian Catholic Assurance Co. Ltd.* v. *F.C.T.*[5] In the United Kingdom, the Revenue is given a specific and express option in this regard. As Fletcher Moulton, L.J. explained in *The Liverpool And London And Globe Insurance Company* v. *Bennett*[2] at page 371 that the Crown:—

"may tax the whole gains and profits under Case I, if it pleases so to do, but in that case it cannot charge the dividends and interest which furnish a component part of these profits under the specific provisions of Case IV."

The question of double taxation was raised. But, the Taxpayer has not shown how the income from the Singapore Life Fund and other funds has been taxed twice. The Revenue has given the assurance that this will never happen. It does not consider that there will be any double charging in respect of any items of income or receipt. In support the Taxpayer cited *Sugden* v. *Leeds Corporation*[6] and *C.I.R.* v. *Sanderson*[7] whereby Lord Haldane in the former case, stated at page 253 that the principle of income tax law, unless otherwise expressly provided and in the clearest terms, is to charge all income with tax, but in the hands of the same person only once. The Revenue accepts the principle as laid down and submits that the income however or in whatever manner it is charged it shall only be taxable once.

That the income of the Taxpayer arising from investments in Malaysia of funds from Malaysian Life Fund is assessable to tax under section 60 of the 1967 Act is not in dispute. What is in dispute is the further contention of the Revenue that while the income arising from investments in Malaysia of funds from Singapore and other places is not assessable under section 60(4); it is assessable under sections 3 and 4(c) or alternatively under section 4(f). From the notes of proceedings at page 23 the learned Judge noted that this income consisted primarily of dividends and the rest of rents and interests. The parties agreed to refer to this income as dividend income. Although the Special Commissioners did not say so in so many words, they must be taken, when they confirmed the

assessments, to have decided that the income received by the Taxpayer was dividend income. The learned Judge favoured the alternative contention of the Revenue that while the income is not covered by section 60(4) it is caught by section 60(8) and the income is therefore subject to tax under section 4(f) as "incidental gross income."

Having dealt with sections 52 and 60(4) and summarised the contentions of the parties the learned Judge made these lucid observations at page 73:—

"I believe the Appellant's point is that by virtue of section 52 its adjusted income from life business is to be computed only in accordance with section 60(4), and since in section 60(4)(a) no mention is made of income from investments in Malaysia out of Singapore life fund or other funds, such income is thereby excluded from chargeability to tax. In my judgment section 60 is a special provision in the sense that if there is any inconsistency between section 60 on the one hand and any other sections in Chapters 1 to 7 on the other hand, the other sections have no effect to the extent of the inconsistency. In the present case the question to be determined is how far and in what respect section 60(4) is inconsistent with sections 3 and 4. The fact that section 60(4)(a) excludes income from investments in Malaysia out of Singapore life fund or other funds appears to be inconsistent with sections 3 and 4 which provide *inter alia* that dividends and gains or profits from a business which accrue in or are derived from Malaysia are chargeable to tax. In view of that apparent inconsistency it would appear that sections 3 and 4 would have no effect in the computation of adjusted income from a life business under section 60(4); but section 60 does not stop at subsection (4)."

He then went on to deal with section 60(8) which was set out earlier in our judgment and stated at page 75:—

"... In my judgment subsection (4) should be read subject to subsection (8). The Appellant's income from investment out of its Singapore life fund or other funds is an incidental gross income in connection with its life business as contemplated in subsection (8). Subsections (3) to (7) do not provide for income from investment out of Singapore life fund or other funds. Therefore under subsection (8) such income should be treated as income falling under section 4(f) and should be assessed to tax accordingly. Thus there is no real inconsistency between sections 3 and 4 on the one hand and section 60(4) on the other; but in accordance with section 52 the application of sections 3 and 4 is modified to conform with subsections (4) and (8) of section 60 so that a dividend under section 4(c) which is an incidental income of the kind described in section 60(8) is taken as income under section 4(f)."

We are of the view that the interpretation given by the learned Judge to section 60 is the correct one. This also supports the contention of the Revenue that section 60(4) is not exhaustive. Section 60(8) is unambiguous. It makes clear that if income is not income within the provisions of subsections (3) to (7), it is also not an income within the provisions of subsection (4). It is also the contention of the Taxpayer that the income under dispute is not an income within section 60(4) and therefore no tax is payable. However, the fallacy of this contention is exposed when we look at section 60(8) which says in no uncertain terms that when income is not chargeable under subsections (3) to (7) which also includes subsection (4) then that income is chargeable to tax under section 4(f). Although section 4(f) is different from section 4(c) in the categorization, to the Revenue the tax implication is the same as the dividend income under section 4(c) is chargeable to tax at the same rate as section 4(f).

It is certainly not within the competence of anyone to impute an intention in an Act in order to bring an income into charge not provided for in the Act itself. The Taxpayer pointed out that the learned Judge took the alternate view as he realised that the dividend income of the Singapore Life Fund and other funds was not one that could be brought under section 60. The only way it could be brought under the normal charging provision is through section 60(8) by treating it as "incidental gross income." However, it is the contention of the Taxpayer that the "incidental gross income" should relate to that of the Malaysian Life Fund not that of the Singapore Life Fund or any other funds. It should be of a kind to which section 60(4) does not provide and it should be neither dividends, interests, rents, *etc.*, but an unclassified category as mentioned in section 4(f). It seems absurd that while income derived from investments of Malaysian Life Fund in Malaysia is liable to tax, the income derived from investments in Malaysia of the Singapore Life Fund or other funds is not assessable to tax. Section 60(8) sweeps away that absurdity and provides a vehicle to catch such income by aptly categorizing it as "incidental gross income." We see no reason to disagree with the learned Judge in treating the income made up of dividends, interests and rents of the Singapore Life Fund and other funds as "incidental gross income" as long as the Taxpayer is not taxed more than once on that income.

We would dismiss the appeal with costs. The deposit is to be paid to the Revenue on account of taxed costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*